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Arconic, Inc. v. APC Investment Co.—Ninth Circuit holds complaint seeking CERCLA contribution timely filed

The Comprehensive Environmental Response, Compensation, and Liability Act establishes a right of contribution in environmental cleanup actions for parties "to recover expenses paid under a settlement agreement or judgment" against non-parties whose actions were also responsible for the site contamination. 42 U.S.C. § 9613(f)(3)(B). Any action brought seeking contribution must be commenced within three years of the settlement agreement approval or judgment. *Id.* § 9613(g). In 1999, the Environmental Protection Agency placed a facility that Omega Chemical Corporation had operated for 15 years in Whittier, California on its National Priorities List. It then began developing a long-term environmental response plan directed at soil and groundwater contamination in the facility's immediate vicinity denominated as Operable Unit 1 (OU-1). The agency later entered into a consent decree with the Omega Potentially Responsible Parties Organized Group (OPOG) to carry out the OU-1 cleanup. The decree received judicial approval in 2001. OPOG then sued other so-called *de minimis* entities in 2004 seeking contribution with respect to the OU-1 consent decree. The latter contributed $1.7 million in return for OPOG "assum[ing] their 'responsibilities' for the site, including their cleanup costs. This assumption was not limited to costs associated with OU-1; it included any Omega-site claims that the United States or another party might, in the future, assert against the *de minimis* parties." This settlement also received court approval.

EPA subsequently determined that chemicals from OU-1 had migrated through groundwater with chemicals from other facilities to create a four-mile toxic plume that it labeled OU-2 and for which it developed a pump/treatment remediation process. OPOG entered into a second consent decree judicially approved in 2017 to carry out the remediation. OPOG amended its complaint to seek contribution against the *de minimis* parties (collectively, APC defendants) for their "'respective equitable shares'" of the obligations undertaken under the second decree. The APC defendants responded with a motion to dismiss the contribution claim, contending that the 2004 settlement had commenced the three-year limitation period's running. The district court agreed. *Arconic, Inc. v. APC Investment Co.*, No. CV 14-6456-GW(Ex), 2019 WL 398001 (C.D. Cal. Jan. 15, 2019).

The Ninth Circuit reversed on appeal. *Arconic, Inc. v. APC Investment Co.*, No. 19-55181, 2020 WL 4579511 (9th Cir. Aug. 10, 2020). The panel began,

> as we must, with the statute's text, ... we find the limitations provision's applicability to claims for "contribution" largely dispositive. Because "[n]othing in § 113(f) suggests that Congress used ... 'contribution' in anything other than [its] traditional sense," the term refers to the "tortfeasor's right to collect from others responsible for the same tort

> after the tortfeasor has paid more than his or her proportionate share." ... [¶] Bearing that in mind, interpreting the limitations provision is fairly straightforward. It provides that a party must pursue contribution following the entry of a "settlement with respect to such costs." The term "such costs" plainly refers to the response costs sought in the contribution action. And since a party can obtain contribution only for costs incurred in excess of its own liability, an action under § 113(f)(1) is necessarily for another's share of the costs faced or imposed under § 106 or § 107(a).

Here, OPOG's attempted characterization of "the 2007 settlement as covering the costs at issue" missed the mark because it "seeks the APC defendants' share of the liability it assumed in the 2017 OU-2 consent decree." Thus, "[t]hat OPOG agreed to forego further contribution from the *de minimis* parties and, in effect, to indemnify them for future cleanup work bears no relation to the APC defendants' responsibility for the [OU-2] site." The panel later expanded on this point, stating that, although OPOG possessed a right of contribution with regard to reimbursement from the *de minimis* parties for the costs incurred under the OU-1 consent decree, "it had not right to contribution outside of that." Rather, "[n]ot until 2016, when the United States sued OPOG for the downgradient plume, could it pursue contribution for its OU-2 costs. Yet the APC defendants' reading of the statute would mean that the limitations period on that claim expired six years earlier, in 2010, which strikes us as nonsensical."

Finally, the panel rejected the APC defendants' judicial estoppel defense based on the proposition that OPOG had "successfully pursued contribution for OU-2 costs in its 2004 suit against the *de minimis* parties, so it cannot now contend that such a claim arose only recently, upon entry of the OU-2 consent decree." It deemed this argument "largely beside the point" because, even conceding such an agreement, the 2004 consent decree "did not impose on OPOG the APC defendants' share of liability for the [OU-2] downgradient plume." That is, "Congress incorporated into CERCLA basic precepts of common-law contribution. Chief among those precepts is that contribution turns on a party having incurred an inequitable share of another's liability. CERCLA's limitations period ... runs upon the entry of the settlement imposing that liability, but not before."

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/08/10/19-55181.pdf